

STATE OF MICHIGAN
COURT OF APPEALS

JERMEY SMITH,

Plaintiff-Appellee,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellant.

UNPUBLISHED

February 15, 2011

No. 295151

WCAC

LC No. 09-000092

Before: HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order of the Workers' Compensation Appellate Commission ("WCAC") affirming the magistrate's open award of wage loss benefits to plaintiff. We vacate and remand for further proceedings.

Plaintiff began working at defendant's Flint assembly plant on November 3, 2003. He performed various assembly jobs, rotating every two hours. In October 2004, plaintiff was assigned to a job installing air conditioning compressors onto engine blocks. The job required plaintiff to lift 35- to 60-pound compressors over his head. After a week at this job, plaintiff felt pain and weakness in his left arm, and was not able to lift his arm above his head. He treated with plant medical while he performed a temporary job. Plaintiff then went on medical leave for two and a half months.

When plaintiff returned to work, he was given a job tightening brake lines and connecting them to the ABS. This job required use of a pneumatic gun. Plaintiff continued to experience pain in his left shoulder and he felt "shocks" through his thumb. In October 2005, defendant transferred plaintiff to a job where he guided engines onto a truck chassis, placed motor mounts, and connected drive shafts. The work required overhead lifting. At some point, plaintiff went on sick leave again.

Plaintiff returned to work in February 2006 and was given work consistent with his restrictions. In October 2006, plaintiff went on sick leave because of trouble with his shoulder. He underwent physical therapy. Plaintiff returned to work in November 2006, performing a job working with trailer hitch harnesses.

Plaintiff was then transferred to the day shift and assigned a job connecting fuel lines to engines. Plaintiff continued to have shoulder pain, and he took more sick leaves. Plaintiff

returned to work on March 16, 2007, but he was unable to perform his work, even with the restrictions. This time, it was plaintiff's right shoulder that was painful.

Plaintiff returned to work in July 2007 at the trailer harness job. He performed this job despite left shoulder pain until December 2007. At that time, plaintiff went off work for more than a month because of a sinus infection. Plaintiff returned to work in January 2008 with restrictions related to his left shoulder pain.

Plaintiff was off work in February 2008 due to stomach flu. Because he failed to provide a doctor's excuse for the absence, he was terminated. He filed a claim for worker's compensation benefits after defendant terminated his employment. The magistrate gave plaintiff an open award of benefits under MCL 418.301(5)(e), based on the finding that plaintiff had been performing reasonable employment for fewer than 100 weeks when he was fired.

A majority of the WCAC panel agreed with the magistrate's analysis and affirmed. The WCAC accepted the magistrate's finding that plaintiff was engaged in "reasonable employment" for fewer than 100 weeks when he was terminated. WCAC Commissioner Ries dissented, concluding that the magistrate's findings were unclear regarding whether plaintiff established a disability under § 301(4), a prerequisite to the application of § 301(5), and recommended remanding the case to the magistrate for further findings and conclusions.

Defendant argues that plaintiff was not disabled because he was able to earn his maximum wages at defendant in unmodified production work that he was capable of performing. Defendant argues that the WCAC erred in affirming the magistrate's award of benefits under § 301(5), in the absence of a disability analysis under MCL 418.301(4) and *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008).

We review questions of law in an order of the WCAC de novo. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401; 605 NW2d 300 (2000). "[A] decision of the WCAC is subject to reversal if it is based on erroneous legal reasoning or the wrong legal framework." *Id.* at 401-402. "In the absence of fraud, we must consider the WCAC's findings of fact conclusive if there is any competent evidence in the record to support them." *Rakestraw v Gen Dynamics Land Systems, Inc*, 469 Mich 220, 224; 666 NW2d 199 (2003).

An employee seeking worker's compensation benefits must establish both disability and wage loss. *Stokes*, 481 Mich at 282. To establish a disability, "[a] claimant must do more than demonstrate that his work-related injury prevents him from performing a previous job." *Id.* "[T]he claimant must first prove a work-related injury. Second, that injury must result in a reduction of the claimant's wage-earning capacity in work suitable to his qualifications and training." *Id.*, citing *Sington v Chrysler Corp*, 467 Mich 144, 155; 648 NW2d 624 (2002). Our Supreme Court in *Stokes* enumerated in detail the criteria that a plaintiff must satisfy to establish a disability:

First, the injured claimant must disclose his qualifications and training. This includes education, skills, experience, and training, whether or not they are relevant to the job the claimant was performing at the time of the injury. It is the

obligation of the finder of fact to ascertain whether such qualifications and training have been fully disclosed.

Second, the claimant must then prove what jobs, if any, he is qualified and trained to perform within the same salary range as his maximum earning capacity at the time of the injury. The statute does not demand a transferable-skills analysis and we do not require one here, but the claimant must provide some reasonable means to assess employment opportunities to which his qualifications and training might translate. This examination is limited to jobs within the maximum salary range. There may be jobs at an appropriate wage that the claimant is qualified and trained to perform, even if he has never been employed at those particular jobs in the past. . . . A claimant sustains his burden of proof by showing that there are no reasonable employment options available for avoiding a decline in wages.

* * *

Third, the claimant must show that his work-related injury prevents him from performing some or all of the jobs identified as within his qualifications and training that pay his maximum wages.

Fourth, if the claimant is capable of performing any of the jobs identified, the claimant must show that he cannot obtain any of these jobs. The claimant must make a good-faith attempt to procure post-injury employment if there are jobs at the same salary or higher that he is qualified and trained to perform and the claimant's work-related injury does not preclude performance. [*Stokes*, 481 Mich at 281-283 (citations omitted).]

The WCAC majority relied on MCL 418.301(5)(e) to support an award of benefits. Section 301(5)(e) requires the payment of benefits if an employee is disabled and loses his job for any reason and he has worked fewer than 100 weeks at reasonable employment:

(5) *If disability is established pursuant to subsection (4)*, entitlement to weekly wage loss benefits shall be determined pursuant to this section and as follows:

* * *

(e) If the employee, after having been employed pursuant to this subsection for less than 100 weeks loses his or her job for whatever reason, the employee shall receive compensation based upon his or her wage at the original date of injury. [MCL 418.301(5)(e) (emphasis added).]

The WCAC erred in affirming the magistrate's award under § 301(5)(e) in the absence of a disability analysis. The 100-week rule only applies "[i]f disability is established" under § 301(4). MCL 418.301(5)(e). The WCAC failed to analyze whether plaintiff established a total disability by satisfying all four elements of the *Stokes* analysis. Such a finding was required before any consideration of § 301(5) would be appropriate.

We remand for findings of fact and conclusions of law regarding whether plaintiff satisfied the definition of disability in MCL 418.301(4) as set forth in *Stokes*. If the WCAC deems it necessary on remand, it may remand the matter to the magistrate for further proceedings. MCL 418.861a(12).

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering